Unless a cable operator owns 10% to 20%, or more, of a programming service, there should be no presumption that the operator exerts, or even can exert, control over the programming vendor. If the interest is over the proposed 10% to 20% range, the cable operator and/or vendor should have the opportunity to rebut any such presumption -- by showing, for example, that, despite a large equity stake, the operator has no meaningful ability to control the vendor's distribution decisions, or that having one seat on a large, diverse board of directors does not provide any real opportunity to influence a programmer's day-to-day or strategic decisions.

F. The Commission Must Insure that Proprietary Information Submitted in Complaint Proceedings Remains Confidential

The Joint Parties acknowledge that the Commission must have full access to contracts and other proprietary information in reviewing claims of discrimination. At the same time, the untimely release of such information, even to the complaining party, could have devastating effects on current negotiations and existing program agreements. The Joint Parties strongly urge the Commission to protect any

proprietary information submitted as part of the complaint resolution process.[24/]

The Joint Parties submit that discovery should only be permitted after (1) the complaining party has alleged facts which, if true, are sufficient to establish the first element of the discrimination test outlined above, that is, a material difference in price, terms or conditions and (2) the Commission staff has conducted a status conference and identified specific documents or classes of documents that may help develop the case.

In order to avoid "fishing expeditions," only the Commission must be allowed to review proprietary information. Moreover, if the Commission requests a programming agreement in the context of a complaint proceeding, any distributor that is a party to the agreement should be provided the opportunity to promptly submit confidential informal comments that may explain any differences in PTC reflected in such agreement. Finally,

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24/ The Joint Parties support the Alternative Dispute Resolution process proposed by the Commission. In the ADR setting, the Joint Parties encourage the Commission to limit review of proprietary information to the decision maker. Additionally, the Joint Parties' concern with confidentiality extends to the data gathered under Section 19(f)(2). It is imperative that the Commission only make this data publicly available in the aggregate and in such a way that individual programmers, cable operators and the terms of their respective agreements are not identifiable.

the Joint Parties strongly support the Commission's proposal to assess monetary forfeitures for frivolous complaints.

II. Section 12: The Commission's Regulation of Program Carriage Agreements Must Not Reach Normal Competitive Activities Within the Multichannel Video Programming Marketplace

The prohibitions in Section 12 are intended to reach extreme conduct -- cable operators are not affected by Section 12 unless, among other things, their behavior is "coercive" or "unreasonably restrains" a vendor's ability to compete. The Commission's rules, therefore, must only reach conduct that is well outside the bounds of the normal rough-and-tumble negotiating that characterizes the marketplace.

A. The Commission Should Establish a Three-Part Test for Determining Whether A Cable Operator Has Engaged in Coercive Behavior Towards a Multichannel Video Programming Distributor

To identify coercive or retaliatory conduct, the Commission should establish a three-part test. As the first prong of the test, complainants must bear the initial burden of demonstrating that coercion or retaliation is plausible. In the vast majority of cases, programmer/cable operator negotiations occur between two sophisticated, well capitalized, mutually dependent companies. Cable operators rarely consider dropping established programming services and some programming services are universally regarded as essential. For example, only under extreme circumstances would any of the Joint Parties ever consider dropping a well

established and popular service such as ESPN, A&E or Lifetime. Given this backdrop, the Commission is absolutely right to question its ability to distinguish between "coercion" and "mutually acceptable arrangements" resulting from arms length negotiations.[25/]

The Commission can, and should, summarily dispose of Section 12 cases if, as a threshold matter, the programmer is too powerful to make coercion plausible, particularly with respect to the cable operator alleged to have engaged in the coercive behavior. A well-known programming service with a substantial subscriber base and a well-established programming niche is not likely to be "coerced," "retaliated against," "unreasonably restrained" or "required to give a financial interest" by any cable operator, regardless of size.[26/] Handling these improbable claims on a summary basis will prevent every unfavorable negotiating experience from resulting in a claim of unfair coercion and protect both legitimate agreements and the Commission's limited administrative resources.

25/ NPRM at 26 (paragraph 56).

26/ For example, Sammons' recent decision to drop MTV was unsuccessful, even though Sammons is a top-20 MSO. Viacom is a programming vendor that simply is not susceptible to coercion, or even to conduct that falls far short of coercion. As a further example, ESPN was able to demand and obtain a $1.00 per subscriber "surcharge" from cable operators, including TCI, for carriage of NFL games.

Following the Commission's determination that coercion is plausible, the complainant should be required to allege specific facts sufficient to warrant allowing its claim to go forward. Under Section 12(a)(2), for example, an aggrieved programmer should allege facts which, if true, would be sufficient to establish that the distributor coerced or attempted to coerce the programmer into providing exclusivity.27/

The Commission must also recognize that cable operators, even if they do receive exclusivity, may receive it for legitimate and not coercive reasons. Large MSOs frequently provide significant non-monetary consideration for exclusivity, particularly for new services. As discussed above, a large MSO may provide advantageous channel placement or unusually valuable markets, momentum, credibility or significant carriage commitments to a new programming service in exchange for exclusivity. Any of these "value" elements should, if present, be sufficient to rebut a presumption of coercion on the part of a cable operator with regard to exclusivity.

Finally, the complainant should be required to allege facts satisfying the statutory requirement that the

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27/ The Commission should not allow the claim to go forward, however, if the distributor is able to point to reasons for negotiations breaking off in addition to the request for exclusivity.

alleged conduct has unreasonably restrained the ability of the unaffiliated vendor to compete fairly. Only after these factual bases have been established should the Commission conduct limited discovery to determine whether there was discrimination and whether the discrimination occurred on the basis of affiliation or nonaffiliation of the vendors.

B. The Commission Must Narrowly Construe Section 12's Prohibition Against A Cable Operator's Favoring of an Affiliated Programming Vendor

The Commission must narrowly interpret Section 12's prohibition against a cable operator favoring an affiliated programming vendor in the selection, terms or conditions of carriage over a non-affiliated vendor. If MSOs are completely prohibited from transacting favorable deals with programmers in which they have invested, they will simply stop investing in programmers, programmers that need support. Program diversity and quality will therefore be severely diminished.

The Commission should recognize that MSOs choose to invest in and carry MSO affiliated programming services for many of the same reasons. In fact, both the investment and affiliation decisions, while ultimately subjective, involve similar criteria and require the same kinds of evaluation. Cable operators know that MSO controlled programming services are adequately capitalized and have owners with the incentive and track record to be sensitive

to operator concerns such as pricing and program content. For example, MSO owned sports networks may be less likely to impose programming surcharges that unduly burden a cable operator and, ultimately, the subscriber.

C. The Commission' Remedies Under Section 12 Should Reflect the Harm to the Aggrieved Vendor

The Commission should limit the time period during which an aggrieved party may bring a complaint under Section 12 to within ninety days after the alleged violation. If the Commission determines that mandatory carriage is warranted, such carriage should be limited to a period of one year plus the amount of time between the Commission's order and the date of compliance by a cable operator -- for example, if it takes an operator six months to add the service as ordered, the mandatory carriage period will be eighteen months. The terms of such carriage should be those reasonable and customary in the industry. Even though this is a difficult standard to identify precisely, the Commission can avoid entangling itself in writing programming agreements if it simply directs the parties to operate on "reasonable and customary" terms. Finally, any forfeitures imposed by the Commission on a cable operator under Section 12 should be reasonably related to the alleged harm to the programmer, but should not exceed such programmer's lost profits.

Conclusion

The Commission's primary obligation in this rulemaking is to create workable rules under which competition in the video programming marketplace can flourish and new programming services can continue to emerge. While Congress has given the Commission the daunting task of regulating a complicated and rapidly changing industry, the Commission can best meet this challenge by enacting rules that emphasize flexibility, competitive vitality and reward for investment.

Respectfully submitted,

CABLEVISION INDUSTRIES CORPORATION
COMCAST CORPORATION
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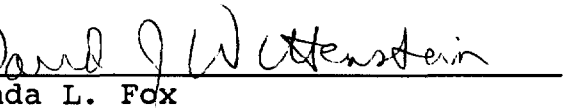
By 
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January 25, 1993

CERTIFICATE OF SERVICE

This will certify that an original and nine copies of the foregoing Comments were delivered by hand this 25th day of January, 1993, to the following:

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Federal Communications Commission
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Michael J. Pierce

January 25, 1993